

NO. 21,944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PVT. FELIX CHAVEZ, JR.,

Appellant,

v.

MAJOR GENERAL R. G. FERGUSSON,
U. S. Army, Commanding General,
Fort Ord, California,

Appellee.

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

The action was commenced in the United States District Court, by the filing of a complaint for declaratory judgment and for injunction. It sought to invoke the jurisdiction of the District Court under 28 USC 1331 and 28 USC 2201. The jurisdiction of this Court is asserted under 28 USC 1291.

The District Court issued an order to show cause, directing the respondents to show cause why the defendant should not be enjoined and restrained from compelling plaintiff to be tried before a court-martial during the pendency of this action. The defendants filed a return to the order to show cause which stated as grounds to dismiss the action, one, the complaint did not state a claim upon which relief could be granted, two, that the Court did not have jurisdiction of the subject matter, and three, that there was absent an indispensable party, to-wit, the Secretary of the Army; also, four, that there are administrative remedies of review and appeal. The Court heard the matter as a motion to dismiss as well as an application for injunction.

The District Court observed that no authority had been advanced by the plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier

who has made the claim that he is a conscientious objector, and in the absence of such authority, the Court concluded that defendant is acting within the scope of his jurisdiction.

With respect to the claim that plaintiff was entitled to declaratory judgment of separation from the military service, the Court stated it believed it was without jurisdiction to entertain such a matter.

On March 30, 1967, the Court ordered that the order to show cause be discharged, and that the action be dismissed.

Appellant, under the caption as plaintiff, thereafter, on April 25, 1967, filed in this Court a motion for a restraining order, together with a memorandum of authorities and an affidavit of the appellant. These documents were docketed as Court of Appeals number 21,794. Service was not effected on appellee. On April 26 the motion was denied.

This proceeding does not appear as a part of the record in this case, nor is it mentioned by appellant. Also not appearing as part of the record in either case is the fact that appellant was tried by court-martial following the denial of the restraining order, and was convicted on April 26, 1967. Review of the court-martial findings is now pending before the Board of Military Review in Washington. (Affidavit of Francis Heisler attached to motion to vacate order.) These matters are also set forth in appellee's motion to dismiss the appeal.

THE FACTS IN THIS CASE

The facts in this case must be derived from plaintiff's complaint in the United States District Court. He alleges that he was born in Los Angeles on March 23, 1944; that he graduated from high school in 1961, and enlisted in the United States Army Reserve in June 1965 for a period of six years. He went on active duty at Fort Ord, California, on

September 10, 1965. The complaint alleges that he became a conscientious objector to war in any form in October 1965 at Fort Ord. He refused to salute any officer and refused to train. On November 17, 1965 he was ordered to be tried before a court-martial. He was tried and convicted and sentenced to the stockade for six months. The confinement was terminated in April 1966. He again refused to obey orders, and a second court-martial was ordered, and he was tried on June 3, 1966. He was also found guilty and was sentenced to six months in the stockade. In April 1966 plaintiff had filed a DA form 1049 pursuant to Army regulations AR 635-20, requesting discharge as a conscientious objector. This application was denied during the time he was serving his sentence on the second court-martial. Following his release from the stockade he for the third time disobeyed orders, and on December 2, 1966 charges and specifications were filed against him.

He alleges in his complaint that having become a conscientious objector to war in any form, he could not conscientiously comply with any orders to be given to him, nor could he in accordance with his teachings salute any officer, nor could he participate in any military training in preparation for war. On this basis he refused to salute his officer and refused to train, and was ordered court-martialed.

Now appellant contends that by reason of his asserted conscientious objection, the acts of the appellee causing him to be court-martialed three times are unlawful.

Appellant contends that AR 635-20 authorizes and requires the appellee to discharge from military service an enlisted man such as appellant, who is a bona-fide conscientious objector; that there is no basis in fact for appellee's refusal so to discharge the appellant; and that said refusal in his behalf, and ordering him to be tried before a court-martial for his conscientious inability to participate in

combat training is unlawful, and that this Court should declare that appellant is entitled to separation from military service pursuant to AR 635-20.

It is quite clear from the foregoing that the appellant voluntarily enlisted and committed himself for a period of six years; that during the course of this enlistment he developed what he calls a conscientious objection to war in all forms, and that because of this conscientious objection he is not going to accept any orders from his superiors; that in pursuing this course of action he three times deliberately refused orders and as a result was court-martialed. It also appears clearly that he was aware of the existence of Army Regulation 635-20, and did make an application under said regulation by utilizing Form 1049 and requesting discharge thereby. This application was submitted through regular channels and was denied. Notwithstanding the denial, the appellant persisted in his own judgment as to what he was going to do and what he was not

going to do, which in effect was a complete repudiation of the obligation that he undertook when he enlisted, and the oath taken at that time.

SPECIFICATION OF ERRORS

In considering the appellant's specification of errors, it must be born in mind that following the dismissal of the action by the District Court, appellant did institute what appears to be a separate proceeding in this Court, by filing a motion for an injunction, and asking the Court for an order to show cause or for an order enjoining the appellee from conducting the third court-martial.

From the Specification of Errors, the appellee extracts the following as possibly the issues which the appellant would present to this Court: first, that because of claim to conscientious objection, appellant has the right to refuse to obey any orders, and that the resulting court-martials which follow such refusal constitute a multiple jeopardy in a constitutional sense; second, that he

has a constitutional right to discharge because of his conscientious objection.

Under the next heading, Argument, appellant specifies as the first subdivision that the United States District Court has jurisdiction over the subject matter. Under this subdivision, he quotes from the Trial Court's Memorandum and Order as follows:

"No authority has been advanced by plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier who has made the claim that he is a conscientious objector. In the absence of such authority, this Court can only conclude that the defendant is acting within the scope of his jurisdiction."

Appellant, following the quotation, then makes the statement that he believes his memorandum of points and authorities did in fact cite cases which were pertinent to his claim, that civil courts are authorized to review military procedures before court-martial to determine whether it acted within its powers.

ARGUMENT

I. There is no constitutional right to relief from the obligation to bear arms because of conscientious objection.

This contention was made in U. S. v.

Macintosh, 283 US 605, to which the Court replied, page 623:

"This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."

Wood v. U. S. (5 Cir.)
373 F.2d 894

George v. U. S. (9 Cir.)
196 F.2d 445

Storey v. U. S. (9 Cir.)
370 F.2d 255

Korte v. U. S. (9 Cir.)
260 F.2d 633,
Cert. den. 358 US 928

Petition of Green
156 F.Supp. 174
264 F.2d 63 (9 Cir.)

Appellant's status is that of an enlisted man. The Supreme Court in In re Grimley, 137 US 147, clearly identified this status, pp. 151, 152:

"Enlistment is a contract; but it is one of those contracts which changes the status; * * * By enlistment the citizen becomes a soldier * * * He cannot of his own volition throw off the garments he has once put on, * * * "

Bell v. U. S.
366 US 393

Power to discharge enlisted members before their term of service expires is expressly granted to the Secretary of the Army.

10 USC 3811.

Exemption from military service on religious grounds is a matter of legislative grace.

Storey v. U. S., supra

Fleming v. U. S. (10 Cir.)
344 F.2d 912

Clark v. U. S. (9 Cir.)
236 F.2d 13

Korte v. U. S., supra

Congress in the Selective Service Act

(50 USC[App.]456j) has provided as follows:

"(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

This section was amended by Congress on June 30, 1967

(Public Law 90-40) to delete the words "in a relation to a Supreme Being involving duties superior to those arising from any human relation".

The Department of Defense as a matter of policy promulgated Department of Defense Directive 1300.6:

"III. POLICY.

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.

"B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection to participation in war, in any form, to the extent that such an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable."

Implementing the DOD 1300.6, the Department of the Army promulgated AR 635-20 and AR 135-25, applicable to personnel in the active military service, and personnel in the Reserve. AR 635-20 states:

"3. POLICY. a. Consideration will be given to requests for separation based on conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

* * * * *

"c. All requests for discharge based on conscientious objection will be considered on an individual basis in accordance with the facts and special circumstances in a particular case."

II. There is no authority which compels discharge, nor is there any authority that relieves an enlisted man from the performance of his duty and accords to him the right of disobedience.

Fleming v. U. S., supra

Clark v. U. S., supra

Storey v. U. S., supra

Korte v. U. S., supra

Courts cannot review and determine validity of military assignments to duty.

Orloff v. Willoughby
345 US 83, 94

Noyd v. McNamara
267 F.Supp. 701
378 F.2d 538 (10 Cir.)

Brown v. McNamara
263 F.Supp. 686

Petition of Green, supra

Federal Courts will not issue a writ of prohibition or otherwise review the acts of a court-martial unless it appears that it is acting in excess of its jurisdiction.

Burns v. Wilson
346 US 137

Smith v. Whitney
116 US 167

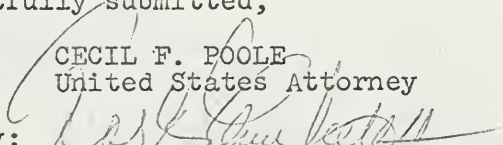
Noyd v. McNamara, supra

CONCLUSION

From the facts of this case, appellant's course of conduct is clear--wilful disobedience of orders. He demands a discharge. His alternative is refusal to obey orders. The ultimate resolution is a discharge by court-martial order. Appellee fails to see any standing in this Court. Appellant's court-martial is now before the Board of Review. It may reach the Court of Military Appeals.

Copy of Army Regulation No. 635-20 is attached as Appendix I, and copy of DOD 1300.6 as Appendix II.

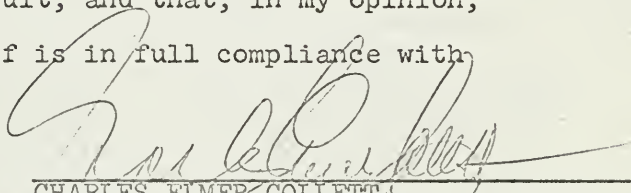
Respectfully submitted,

By; 
CECIL F. POOLE
United States Attorney
CHARLES ELMER COLLETT
Chief Assistant United States Attorney
Attorneys for Appellee

DATED: November 28, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

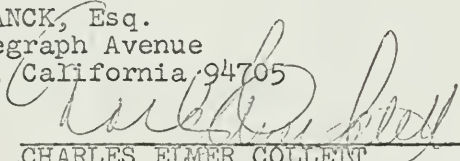
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that copies of the foregoing Appellee's Brief were served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioner,

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CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED:
November 28, 1967.

PERSONNEL SEPARATIONS

CONSCIENTIOUS OBJECTION

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1. Purpose. This regulation sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of religious training and belief, claim conscientious objection to participation in war in any form.

2. Scope. This regulation applies equally to commissioned officers, warrant officers, and enlisted personnel in the active military service.

3. Policy. *a.* Consideration will be given to requests for separation based on conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

b. Requests for discharge will not be entertained when based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training. Similarly, requests for discharge will not be entertained when based solely on conscientious objection claimed and denied by the Selective Service prior to induction.

c. All requests for discharge based on conscientious objection will be considered on an individual basis in accordance with the facts and special circumstances in a particular case.

d. Final determination will be made at Headquarters, Department of the Army, on all requests for discharge based on conscientious objection.

4. Procedure. *a.* Military personnel will submit applications for discharge by reason of conscientious objection on DA Form 1049 (Personnel Action) to their immediate commanding officers. The individual requesting discharge will include in his application or as an inclosure thereto the

information indicated below as the minimum required for consideration of his request. The individual may submit such other information as desired.

(1) General information.

- (a) Full name.
- (b) Military service number.
- (c) Selective service number.
- (d) Service address.
- (e) Permanent home address.
- (f) Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).
- (g) Give a chronological list of all occupations, positions, jobs, or type of work other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.
- (h) Give all addresses and dates of residence where you have formerly lived.
- (i) Give the name and address of your parents and indicate whether they are living or deceased.
- (j) State the religious denomination of sect of your father and mother.
- (k) Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior

*This regulation supersedes AR 635-20, 9 November 1962, and rescinds DA message 742770, 4 December 1965.

to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

- (1) If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes ____ No ____ Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes ____ No ____

(2) Religious training and belief.

- (a) Do you believe in a Supreme Being?
(b) Describe the nature of your belief that is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties that to you are superior to those arising from any human relation.
(c) Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.
(d) Give the name and present address of the individual upon whom you rely most for religious guidance.
(e) Under what circumstances, if any, do you believe in the use of force?
(f) Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.
(g) Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

3) Participation in organizations.

- (a) Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.
(b) Are you a member of a religious sect or organization? If your reply is "yes"—

1. State the name of the sect, and the

name and location of its governing body or head if known to you.

2. When, where, and how did you become a member of said sect or organization.
3. State the name and location of the church, congregation, or meeting where you customarily attend.
4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.
5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.
(c) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.
(4) References. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

b. Immediately upon receipt of a request for discharge on the grounds of conscientious objection, the individual's commanding officer will fully advise and counsel him concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of a person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, will bar all rights (except Government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counseling, the member will be required to sign and date the following statement:

I have been counseled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfac-

tory military duty or otherwise comply with lawful orders of competent military authority may bar all rights based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

c. An individual requesting discharge will receive a counseling interview by a chaplain and a psychiatric interview by a psychiatrist (or medical officer if a psychiatrist is not available). The chaplain will submit a report of the interview to include the sincerity of the individual in his belief and an opinion as to whether the individual's objection to military duty is based on his religious beliefs. The psychiatrist will submit a report of psychiatric evaluation indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels.

d. The application for discharge, together with the inclosure(s), and reports of interviews, will be forwarded through military channels to The Adjutant General, ATTN: AGPO, Department of the Army, Washington, D.C., 20315.

(1) The comment by unit commander on DA Form 1049 will include the following information:

- (a) Whether approval or disapproval is recommended. The reason(s) therefor will be included.
- (b) Duty and primary MOS (enlisted personnel only).
- (c) Whether medical board or physical evaluation board proceedings are pending or appropriate.
- (d) Whether under investigation, under charges, awaiting result of trial, absent without leave, or whether any flagging action has been taken in accordance with AR 600-31.

(2) Subsequent forwarding comments on DA Form 1049 will include recommendation for approval or disapproval and any other remarks that may be pertinent.

[AGPO]

e. The Adjutant General, Department of the Army, will coordinate with the Selective Service System.

5. **Assignment.** An individual requesting discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum conflict with his professed beliefs pending a final decision on his application.

6. **Discharge of personnel having less than 180 days service.** Personnel who have less than 180 days service when discharged will be discharged by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. National Headquarters, Selective Service System, 451 Indiana Avenue NW., Washington, D.C., 20435, will be notified promptly of date of discharge from military service; advised that the individual has not completed 180 days active duty, and requested to induct the individual into the Selective Service Conscientious Objectors' Work Program.

7. **Authority.** a. *Commissioned officers and warrant officers.* Authority AR 635-20 and SPN 558 for separation will be included in orders announcing discharge of individuals.

b. *Enlisted personnel.* Authority AR 635-20 and SPN 318 for discharge will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer processing for discharge.

8. **Form of separation certificates.** a. *Discharge.* An Honorable Discharge Certificate (DD Form 256A) or a General Discharge Certificate (DD Form 257A) will be furnished. Commissioned officers and warrant officers will be furnished a discharge certificate in accordance with AR 635-5 or as directed by Headquarters, Department of the Army. Enlisted personnel will be furnished a discharge certificate in accordance with AR 635-200.

b. *Report of separation.* Armed Forces of the United States Report of Transfer or Discharge (DD Form 214) will be furnished each individual discharged from service under this regulation.

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:

F. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

Distribution:

To be distributed in accordance with DA Form 12-9 requirements for Military Personnel Procedures, Officer and Enlisted:

Active Army: A. NG: D. USAR: None.



ASD(M)

Department of Defense Directive

SUBJECT Utilization of Conscientious Objectors and Procedures
 for Processing Requests for Discharge Based on
 Conscientious Objection

References: (a) DoD Directive 1332.14, "Administrative Discharge"
 (b) DoD Directive 1315.1, "Disposition of Conscientious
 Objectors," June 18, 1951 (cancelled herein)

I. PURPOSE

This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

II. APPLICABILITY

The policies and procedures set forth herein apply to all personnel of the Army, Navy, Air Force and Marine Corps and to all Reserve components thereof.

III. POLICY

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.
- B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection

to participation in war, in any form, to the extent that such an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable.

- C. Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.
- D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. The type of discharge, if separation is deemed warranted, will be determined by the individual's military record, the standards set forth in reference (a), and the procedural guidelines herein.
- E. In evaluating requests for discharge based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that discharge procedures of the services not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards.
- F. The standards used by the Selective Service System in determining 1-O or 1-A-O classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. 1-A-O classification permits induction into the military service and the inductee is required to perform duties as outlined in Section V.A. of this Directive. 1-O classification does not permit induction into military

service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program). In either of the classifications the registrant is required to fulfill his obligations under the UMT&S Act.

- G. In order to insure the maximum practicable uniformity among the services and between members of the same service, advisory opinion by the Selective Service that a classification of 1-O is appropriate will normally be a requisite for discharge or release of members with less than two years active service based on conscientious objection.

IV. CRITERIA

- A. The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board, but are the result of extensive experience and practices which have been upheld in the Courts in connection with legal obligations for service. Among the factors considered are such items as membership in a peace church, training in home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities, his participation in religious activities, and his credibility and the credibility of persons supporting his claim. In the case of servicemen not liable for induction after discharge because of having served 180 days or more, the individual's willingness to engage voluntarily in post-military work of the nature encompassed by the Alternate Service Plan of Selective Service may also be pertinent.
- B. While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.
- C. Evaluation of the sincerity of a claim of conscientious objection requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

- A. 1. Individuals inducted into the Service who have previously been classified as 1-A-O by local induction boards should be assigned to noncombatant service, which in accordance with the President's Executive Order No. 10028, dated January 13, 1949, is defined as:
- (a) service in any unit of the armed forces which is unarmed at all times;
 - (b) service in the medical department of any of the armed forces, wherever performed; or
 - (c) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

"The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

2. Such persons, upon induction into the Service, shall be transferred to a training center, or station, for recruit training and shall be subject to all regular training, except the portions thereof specifically excepted by Executive Order No. 10028 quoted in A.1, above. Thereafter, upon completion of recruit training, they shall be transferred to Hospital Corps, or Medical Department, for further training, provided they meet the requirements therefor. Such men, because of assignment to medical units will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical organization. Any man who does not meet the requirements for this training, or who fails to complete the course, will be retained in the service and employed in noncombatant duties.

- B. Personnel who claim to be conscientious objectors and state that they were so classified by their local board but their records do not so indicate:

1. The Commanding Officer shall obtain a statement from the individual concerned and refer the case to the departmental headquarters of the individual's service for investigation and decision. The departmental headquarters will investigate the matter through Selective Service.

2. If it is determined that the man should have been classified as 1-A-O, but inadvertently was not so classified, the records will be corrected, and the Commanding Officer will be directed to correct his records accordingly. The man then will be processed as indicated in V.A. above.
3. If it is determined that no change in classification is warranted, the individual will be notified to this effect.
4. Upon first referring of the case, pending its decision, the individual should be retained at his command and employed in noncombatant duties.

- C. 1. Individuals requesting discharge for conscientious objection will submit information as required in Inclosure 1 and such other documentation of their cases as is deemed appropriate by the military department concerned. In order to preserve the maximum practicable uniformity of treatment for like cases, requests and supporting papers will be forwarded, together with any other pertinent information known to the immediate command, to departmental headquarters for individual determination of action on the basis of the facts and the special circumstances of each case.
2. Immediately upon receipt of a request for discharge on grounds of conscientious objection, the member will be fully advised and counselled concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counselling, the member will be required to sign and date the statement appended hereto as Inclosure 2.
 3. Before making a determination concerning a possible discharge for conscientious objection in cases falling within the terms of Section III.G., the military department concerned will forward each case to the Director, Selective Service System, Washington 25, D.C., for an advisory opinion as to the individual's proper classification under the UMP&S Act. At the discretion of the military department concerned, advisory opinions may also be sought on members with two or more years service.

- D. 1. Individuals for whom 1-O classification is recommended by Selective Service will ^{normally} be considered for discharge by reason of their conscientious objection to military service.
2. Individuals for whom 1-A-O classification is recommended normally will not be considered for discharge for conscientious objection reasons, but will be reassigned to noncombatant duties as outlined in Section V.A. of this Directive. Individuals so reassigned will be required to sign and date the statement appended hereto as Inclosure 3.
3. Individuals for whom neither 1-O nor 1-A-O classification is recommended by Selective Service will be retained in military service, subject to normal duty assignments.
4. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the military service who demonstrates similar behavior.
- E. 1. Individuals for whom 1-O classification is recommended by Selective Service will normally be discharged "For the Convenience of the Government." Conscientious objection will be cited as the supporting reason in order to avoid possible future confusion. Pending separation, the individual will be assigned duties providing the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.
2. Personnel with less than 180 days service (volunteers or inductees) who are determined to be bona fide conscientious objectors (1-O classification) and whose request for separation is made early enough so that discharge occurs prior to completion of 180 days active duty will be separated for the convenience of the government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the Selective Service System will be promptly notified of the date of discharge from the military service, the fact that the individual has not completed 180 days active duty, and will be requested to "induct" the individuals for the alternate service provided by the UMT&S Act.

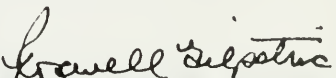
- F. Determination by the military department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

VI. IMPLEMENTATION AND EFFECTIVE DATE

- A. All service regulations and policies in conflict with this Directive shall be cancelled immediately. Three copies of regulations implementing the policies contained herein will be furnished to the Assistant Secretary of Defense (Manpower) within 90 days from the date of publication of this Directive.
- B. This Directive is effective immediately.

VII. CANCELLATION

Reference (b) is hereby superseded and cancelled.


Deputy Secretary of Defense

Inclosures - 3

1. Required Information
2. Statement (counselling concerning VA benefits)
3. Statement (counselling concerning designation as conscientious objector)

Required Information

Each person seeking release from active service from the Armed Forces, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the Military Departments from requiring additional information as they desire. The individual may submit such other information as desired.

A. General Information

1. Full name.
2. Military Serial Number.
3. Selective Service Number.
4. Service Address.
5. Permanent Home Address.

6. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

7. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer and the from/to date for each position or job held.

8. Give all addresses and dates of residence where you have formerly lived.

9. Give the name and address of your parents and indicate whether they are living or deceased.

10. State the religious denomination or sect of your father and mother.

11. Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

12. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes _____ No _____. Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes _____ No _____.

1. Religious Training and Belief.

1. Do you believe in a Supreme Being?
2. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which you are superior to those arising from any human relation.
3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.
4. Give the name and present address of the individual upon whom you rely most for religious guidance.
5. Under what circumstances, if any, do you believe in the use of force?
6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrates the consistency and depth of your religious convictions.
7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

2. Participation in Organizations.

1. Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.
2. Are you a member of a religious sect or organization? If your reply is "yes": -
 - a. State the name of the sect, and the name and location of its governing body or head if known to you.
 - b. When, where, and how did you become a member of said sect or organization?
 - c. State the name and location of the church, congregation, or meeting where you customarily attend.
 - d. Give the name, title, and present address of the pastor or leader of such church, congregation or meeting.
 - e. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.
3. Describe your relationships with and activities in all organizations in which you are or have been affiliated, other than military, political, or labor organizations.

D. References.

1. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

STATEMENT

I have been counselled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights, based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, government (converted) or National Service Life Insurance.

STATEMENT

I have been counselled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or active service in the Armed Forces.

NO. 21, 944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FT. FELIX CHAVEZ, JR.,)
)
Appellant,)
)
vs.)
)
)
)
)
MAJOR GENERAL R. G. FERGUSON,)
)
S. Army, Commanding General,)
)
Fort Ord, California,)
)
Appellee.)
)

APPELLANT'S REPLY BRIEF

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1
2
3
4 NO. 21, 944

5 IN THE UNITED STATES COURT OF APPEALS
6 FOR THE NINTH CIRCUIT
7

8 PVT. FELIX CHAVEZ, JR.,)
9 Appellant,)
0 vs.)
1 MAJOR GENERAL R. G. FERGUSON,)
2 U. S. Army, Commanding General,)
3 Fort Ord, California,)
4 Appellee.)
5

6 APPELLANT'S REPLY BRIEF

7 The Brief submitted by Appellee is striking because of the
8 demonstrated ability to sidestep the issues raised by Appellant in his
9 Opening Brief. Appellee's Brief is striking because neither in the recitation
0 of the Facts of the Case nor in the Specification of Errors, and last but not
1 least, in the Argument, the term due process of law does not appear once.
2 Appellee's Brief is further striking because it fails to discuss the important
3 issue raised as to the authority of the military to court martial Appellant
4 for the third time.

5 Appellee's Brief is striking because the Complaint, it self, as
6 summarized in our Opening Brief on pages 2 to 4, states that
7

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1 "Appellant also claimed that Appellee was in-
2 formed of his inability to participate in
3 preparation for war, nevertheless, caused him
4 to be court-martialed twice and threatened with
5 a third one; thus depriving him of due process of
6 law." (emphasis ours)

7 Appellee, while not disagreeing with the Statement of the Case as
8 given by Appellant on pages 4 to 7 of the Opening Brief, chooses to
9 disregard it. On page 6 of the Opening Brief, it is claimed that Appellant

1 "...was entitled to separation and the denial of
2 such separation by the Appellee was illegal,
3 unconstitutional and void, and it was in clear
4 defiance of AR 635-20. It was also contrary to
5 the provisions of Title 50 USC 456 (j) pertaining
6 to conscientious objectors."

7 The Specification of Errors as given on pages 7 and 8 of Appellant's
8 Opening Brief are clear and concise, and the fact that Appellant

9 "...did institute what appears to be a separate
10 proceeding in this Court,..."

11 as set forth on page 8 of Appellee's Brief diminishes the issues presented
12 not at all.

13 Appellee's Argument, pages 10 to 15 of his Brief, repeats the
14 argument that was presented by him in his Motion to Dismiss Appeal. In
15 fact, the cases cited in said Motion with the exception of United States vs.
16 Macintosh, 283 US 605, Clark vs. United States (9th Cir.), 236 F 2d 13,
17 and Fleming vs. United States (10th Cir.), 344 F 2d 912, are taken into
18 Appellee's Brief substantially verbatim from the Motion to Dismiss Appeal.
19 Since Appellant's Opposition to Appellee's Motion to Dismiss Appeal
20 answered the references to those cases which were cited in the Motion to
21 Dismiss, we are not going to burden the Court by repeating our argument,

but will restrict ourselves to that of Appellee's argument which appears to be in addition to his Motion to Dismiss.

ARGUMENT

I

The reliance of Appellee upon United States vs. Macintosh, supra, is misplaced because of subsequent decisions of the Supreme Court. While Appellant claims, and we believe correctly, that because the issues are of constitutional dimension as interpreted by the United States Court of Military Appeals in United States vs. Tempia, CM 19815, Appellee fails to meet this thrust of our argument as it fails to meet the thrust that the threatened third court martial deprived Appellant of due process of law. Instead of this argument, Appellee seems to rely on United States vs. Macintosh. However, we believe that Girouard vs. United States, 328 US 61, 66 S Ct 826, clearly overruled the Macintosh case, as it overruled the companion cases, United States vs. Schwimmer, 279 US 644, 49 S Ct 448, and United States vs. Bland, 283 US 636, 51 S Ct 569.

Justice Douglas, who delivered the opinion of the Court in the Girouard case, stated that

"...the principle emerging from the three cases (meaning the Schwimmer, Macintosh, and Bland cases) obliterates any factual distinction among them. As we recognized in In re Summers, 325 U.S. 561, 572, 577, 65 S.Ct. 1307, 1313, 1316, they stand for the same general rule -- than an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think demonstrated in the dissents of Mr. Justice Holmes in the Schwimmer case and of Mr. Chief Justice Hughes in the Macintosh case."

It appears to the Appellant that this wording clearly indicates that

the Macintosh case is no authority for the proposition advanced by the Appellee. In fact, Justice Douglas seems to hold the dissenting opinion of Chief Justice Hughes in the Macintosh case and of Justice Holmes in the Schwimmer case are the law pursuant to the Girouard decision. Chief Justice Hughes pointed out in the Macintosh case at page 633 that religious scruples against bearing arms have been recognized by Congress in the various draft laws. Justice Holmes in the Schwimmer case at page 654 underlines the principle

"...of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate."

Justice Douglas in the Girouard case joins Justice Holmes by saying that

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Justice Douglas then quotes United States vs. Ballard, 322 US 78, 64 S Ct 882, to the effect that

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. West Virginia State Board of Education vs. Barnette, 319 U.S. 624, 63 S Ct 1178, 87 L. Ed. 1628, 147 A. L. R. 674."

The majority of the Supreme Court in the Macintosh case then concludes

"...that the Schwimmer, Macintosh and Bland cases do not state the correct rule of law."

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Appellant submits that Appellee's Argument, under I, relying on Macintosh, does not state the law correctly and the cases cited by Appellee in addition are similarly lacking authority. (Appellee cites on page 10, Storey vs. United States (9th Cir), 370 F 2d 255, which citation appears in his Motion to Dismiss Appeal. However, there it is designated as Stacey vs. United States.)

Appellee relies on an old, old case when he cites In re Grimley, 137 US 147 as an authority for the apparent claim of Appellee that a military man by enlisting into the Armed Forces of the United States, ipso facto, loses his constitutional rights. This argument was put to naught by Tempia vs. United States, *supra*, as thanks to the genius of the Constitution the hoary concepts were substituted by concepts more in line with our understanding of social problems. Reading the law as it ought to be read, one must conclude that wines and law decisions do not necessarily improve with age.

We do not believe that Appellee would insist that Scott vs. Sanford, 19 Howard 329 is still the law just because it was decided in 1857 to the effect that a Negro has no standing in the Court of law. The Supreme Court of the United States felt unbound by an ancient holding and so it stated in Brown vs. Board of Education, 349 US 294, 75 S Ct 753.

II

Contrary to Appellee's claim, there is an authority, and that is the due process of law which compels action even by the military.

Burns vs. Wilson, 346 US 137, 73 S Ct 1045 contradicts Appellee's claim presented as his second point on pages 14 and 15. In that case

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"The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the courts-martial which tried petitioners had jurisdiction over the crimes with which they were charged as well as jurisdiction to impose the sentences which petitioners received."

The Court of Appeals affirmed the District Court judgment and the Supreme Court granted certiorari because

"Petitioners' allegations are serious, and, as reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial..."

In the Burns case, the petitioners claimed they they were court martialed and sentenced by that court

"as a result of proceedings which denied them basic rights guaranteed by the Constitution."

as the Appellant here claims that the two court martials and the threatened third court martial denied him basic rights guaranteed by the self-same Constitution. In the Burns case the Supreme Court held that

"The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power (footnote refers to 28 USC, Para. 2241). Accordingly, our initial concern is not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power."

Appellant claimed in his original Brief and he repeats his claim here that the District Court erred when it denied his application without a hearing on the ground that the federal courts have no jurisdiction over court martial proceedings. While we know that the Supreme Court made it

1 clear that

2 "Military law, like state law, is a jurisprudence which
3 exists separate and apart from the law which governs
4 in our federal judicial establishment."

5 Nevertheless, it also held in the Burns case that

6 "The military courts, like the state courts, have the same
7 responsibilities as do the federal courts to protect a person
8 from a violation of his constitutional rights."

9 Appellant set forth in his original pleadings filed in the District Court
10 that the threatened third court martial, if proceeded with, will violate his
11 constitutional right not to be put into double or multiple jeopardy. In
12 accordance with the holding of the Supreme Court in the Burns case and in
13 accordance with the holding of the United States Court of Military Appeals
14 in the Tempia case, supra, the District Court was bound to assume
15 jurisdiction and because of its failure to do so, the holding of that Court
16 must be reversed.

17 CONCLUSION

18 As set forth in Appellant's Opening Brief, Appellant's rights which
19 were threatened by the third court martial were of constitutional
20 dimensions, and therefore, the District Court was bound to assume
21 jurisdiction and grant the protection as prayed for in the Complaint. The
22 refusal of the District Court to do so requires reversal and the Appellant
23 prays that an Order may be entered upon the Trial Court to proceed with the
24 hearing of the case on the merits.

25 Such a hearing ought to be granted even though the third court martial
26 did in effect take place as it is claimed by Appellee on page 15 of his Brief.
Pursuant to this third court martial he was found guilty and was sentenced
to one year at hard labor and to a dishonorable discharge as well as

forfeiture of all pay and allowances. It is true as set forth by Appellee that the review of the decision of the court martial is now before the Board of Review. In fact, the Brief on behalf of Appellant was forwarded to the Board of Review in Washington, D. C. on November 20, 1967. There is, however, no decision, and since Appellant may have completed his court martial sentence before a decision is forthcoming from the Board of Review, there is no likelihood whatsoever that the case

"...may reach the Court of Military Appeals."

as claimed by Appellee.


Appellant submits that whatever the decision of the Board of Review may be, the issue raised by him in the District Court of the United States is not moot, and, in fact, the constitutional questions remain whether or not the court martial had jurisdiction to proceed against him the third time and whether or not the sentence which stamped his action based on his religious scruples "dishonorable" may stand. To determine that issue, an Order upon the United States District Court to hear the case on the merits is required.

Dated, Carmel, California,

January 10, 1968.

Respectfully submitted,

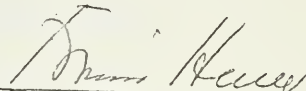
FRANCIS HEISLER
HEISLER & STEWART
PETER FRANCK

By 
Attorneys for Appellant.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was personally served by me upon the United States Attorney, counsel for Appellee, at 450 Golden Gate Avenue, 16th Floor, San Francisco, California.



Francis Heisler
Attorney for Appellant

Dated: January 11, 1968.

